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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES O. HEWITT, ET AL., AND RINCON DEL DIABLO MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE CITY OF ESCONDIDO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

Whether it is a denial of equal protection of the laws under the fourteenth amendment for a popularly elected board of directors of a municipal corporation to enter into an agreement which effectively transfers in perpetuity all significant powers, rights and duties of the board to another municipal corporation, thereby diluting the force and effect of the vote of the constituents for the members of the board?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioners, JAMES O. HEWITT, ET AL., and RINCON DEL DIABLO MUNICIPAL WATER DISTRICT, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division 1, entered in this proceeding on June 18, 1980. Petitioners filed a timely petition for hearing before the California Supreme Court, which was denied August 13, 1980.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division I, is reported at 107 Cal. App. 3d

78, 165 Cal. Rptr. 545 (1980), and is attached as Appendix "A".[1] The California Supreme Court's denial of the petition for hearing is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on June 18, 1980, reversing the judgement of the Superior Court of the State of California for the County of San Diego entered on September 29, 1978, which is attached as Appendix "C". Thereafter, on August 13, 1980, the Supreme Court of California denied a timely filed petition for hearing and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1:

[N]or shall any State. . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, HEWITT *et al.*, are voters, landowners, and water-users within the Rincon Del Diablo Municipal Water District (hereinafter referred to as "Rincon").[2] Petitioner

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[1] Reference to the Appendices attached hereto will be denominated "App." and follow the pagination of the respective Appendix. References to the record in the trial court will be to the Clerk's Transcript, denominated as "C.T.", and to the Reporter's Transcript of the trial, denominated as "R.T.", and follow the pagination of these volumes. References to the present Petitioners brief on appeal will be denominated "Resp. Br." and follow the pagination of the brief. References to the Petitioner's Petition for Hearing by the California Supreme Court will be denominated "Pet." and follow the pagination of the petition.

[2] The factual statement is derived primarily from the findings of fact of the trial court (App. "C", at C-4 to C-6), and also from the opinion of the Court of Appeal (App. "A").

Rincon is a municipal corporation organized in 1954 pursuant to the provisions of the Municipal Water District Law of 1911 (Calif. Water Code § 71000 *et seq.*). The City of Escondido (hereinafter referred to as the "City") is a general law city which owns and operates a water system, as does Rincon.

The territory of Rincon virtually encircles the City but originally included only land located outside the City's territorial limits. Due to expansion of the City, certain portions of land now lie within both Rincon and City. The major portion of Rincon's territory still remains outside of the City's boundaries.

Rincon's governing body consists of an elected board of directors who exercise executive and administrative powers. Resident water users within Rincon vote for the members of the board of directors. The vast majority of the constituents of Rincon reside outside of the city limits of the City. People who live outside of the City do not have a right to vote for the governing body of the City, the Escondido City Council.

Prior agreements between Rincon and the City provided for inter-connections between the two water systems and for the allocation of designated primary service areas for each system. The agreement at issue in this case, the Operational Merger Agreement (hereinafter referred to as the "Merger Agreement"), was entered into in July, 1972, in part to settle pending litigation between the parties, and with the long-range goal of integrating the respective water systems. This contract, which is attached as Appendix "B", calls for improvements by both of the parties to their respective water systems prior to "full merger". Upon "full merger" the power to operate all aspects of Rincon's water system is transferred to City, including the power to set water rates, to make all decisions regarding capital improvements to the Rincon system, and to determine solely the policy, direction, and development of the Rincon water district in perpetuity.

This action was originally brought against Rincon to contest the propriety of the construction of a water system improvement called for by the Merger Agreement. That project was subsequently shelved and the focus of the lawsuit shifted to the validity of the Merger Agreement, with Rincon eventually siding with, and becoming one of the Petitioners. In the trial court, petitioners prevailed, the court holding that the Merger Agreement was void and unlawful from its inception on several grounds, including principally that it was a denial of equal protection of the laws to the Rincon constituents because it substantially disinfranchised the voters, and that it was an invalid delegation of legislative authority. Petitioners initially raised the Federal question of the application of the equal protection clause of the fourteenth amendment in oral arguments before the trial court (R.T., at 93-96) and in the trial brief filed by Petitioners immediately after trial. (C.T., at 356, 362).

The trial court, in addressing this issue (App. "C", at C-6), stated as follows:

> 1. The right of residents of a municipal water district to vote for the members of the governing body of the district is fundamental because the acts of the governing body of the municipal water district have significant impact on the quality of water consummed, the availability of water for domestic and agriculture requirements and the economic well-being of the water users within the District.
>
> 2. The contemplated merger will disenfranchise the residents and water users of Rincon, who will be subjected to water rates fixed by, and who will have questions of expansion, acquisition, maintenance and revenue determined by, a board composed of representatives they did not and could not elect or remove from office.

The City appealed the decision of the trial court to the California Court of Appeal, Fourth Appellate District, Division I, which reversed the judgment of the trial court. Petitioners

again raised the issue of equal protection in their brief (Resp. Br. at 42-47) and in oral arguments before the court. Nevertheless, the Court of Appeal, in addressing this issue (App. "A", at A-13) stated as follows:

> There is no disenfranchisement of the voters of Rincon and no denial of equal protection of the law. The United States Supreme Court in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 [99 S.Ct 383], makes it clear there is no constitutional requirement that extraterritorial extension of the right to vote must accompany extraterritorial extension of municipal powers, it being consistent with equal protection requirements for a government unit to restrict the vote to those who reside within its borders. This principle was also recognized by the California Supreme Court in *County of Inyo v. Public Utilities Commission, supra,* 22 Cal. 3d. 154.

Petitioners filed a timely petition for hearing with the California Supreme Court, which petition urged the equal protection issue (Pet., at 13-23). The Supreme Court denied hearing, thus making the California Court of Appeal, Fourth Appellate District, Division I, the last court to render a decision on the merits of the case, and making the Court of Appeal the appropriate court to which to direct the writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION OF THE DOCTRINE OF EQUAL PROTECTION TO THE FACTS OF THIS CASE PRESENTS AN ISSUE NOT HERETOFORE PRESENTED FOR DECISION BY THIS COURT

This case presents a situation in which a municipal entity, where the governing body is elected by popular vote, has transferred to another municipal entity substantially all of the exercised powers, rights, and duties of the governing body. Petitioners contend such a transfer of power violates the equal

protection guarantee of the fourteenth amendment. The erosion of power of the governing body of Rincon wrought by the Merger Agreement renders the governing body virtually powerless to control its own destiny and its only significant historical function, the delivery of water. Thus, the force and effect of the vote of the members of Rincon is eroded and diluted to such an extent, there is an unconstitutional denial of equal protection. While this variety of denial of equal protection is one that has been recognized by this Court, as will be discussed below, it is one that has never been squarely presented for decision.

Petitioners contend that the Merger Agreement gives the City the sole right to make all decisions respecting the operation, improvement, maintenance, expansion and direction of the water district. Absent the Merger Agreement, these powers, rights, and duties would be exercised directly by the elected board of directors of Rincon. The California Court of Appeal minimized the scope and effect of the Merger Agreement despite the fact that, with the exception of a small fire protection district (consisting of one fire truck and voluntary firemen), the operation of the water district is the only function performed by Rincon. While the Court of Appeal did not find the Merger Agreement to be an unlawful delegation of legislative power under California law, it is beyond serious dispute that the Merger Agreement provides for the transfer of virtually all policy-making, discretionary power respecting the water district to the City. To the members of Rincon, these are virtually all powers of significance. Effective control over the water district and its development through the right to vote for the board of directors has been irrevocably lost to the Rincon constituents. This surrender of the significant functions of the board of directors of Rincon represents a dilution and debasement of the right to vote for the board that is in violation of the doctrine of equal protection.

At what point does the transfer of power and authority by an elected board so dilute the force and effect of the voters as to constitute a denial of equal protection? This Court has itself recognized that the dilution and debasement of an elected official's power gives rise to a constitutionally valid complaint of

a denial of equal protection. This recognition came in a concurring opinion of Justice Powell, joined in by Chief Justice Burger and Justice Blackmun, in the case of *Abood v. Detroit Board of Education,* 431 U.S. 209, 261, 52 L.Ed. 2d 261, 301, 97 S.Ct. 1782 (1977). In the *Abood* case, which involved the constitutionality of an arrangement which required non-union members to contribute to a union as a condition of employment, Justice Powell expressed in a footnote a comparable complaint to that of the voters of Rincon. Justice Powell said:

> Yet such a delegation of state power [of the school board to another state agency], covering an unlimited range of the school board's responsibility to set school policy . . . , would itself raise grave constitutional issues. If power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the school board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decision-making process had been unconstitutionally diluted.

Petitioners respectfully submit that the transfer of power in the instant case comes squarely within the reasoning and factual situation hypothesized in the above quotation. The power to determine water district policy has been shifted *in toto* from officials elected by the population of the water district to officials elected by the population of the City. There seems little doubt that the voters have had their voting power and influence on the decision making process unconstitutionally diluted.

II.

THE DENIAL OF EQUAL PROTECTION BROUGHT ABOUT BY THE DIMUNITION AND EROSION OF AN ELECTED OFFICIAL'S POWER AND AUTHORITY THROUGH A CONTRACT BETWEEN STATE AGENCIES IS OF BROAD IMPORTANCE AND SIGNIFICANCE

The significance of the issue in this case extends far beyond the confines of the Rincon Municipal Water District. Municipal

corporations, state agencies, cities, and states are constantly entering into contractual relationships that, to some degree, limit, erode, or transfer the power and authority of one entity to another. Certainly, in the vast majority of cases, the transfer involves innocuous responsibilities or duties that raise no constitutional questions. However, as pointed up by this Court's comments in *Abood, supra,* in some instances the nature of the power transferred, or the extent of the transfer, will interpose a constitutional defect. That is the situation in the case at bar. The application and effect of the doctrine of equal protection in this context must be defined and explained so that states, their agencies and entities, and the courts may have guidance in making and reviewing current and future contractual arrangements. The course of equal protection through these uncharted waters is an important aspect of the protection afforded citizens under the constitution, especially in view of the increasing complexity of our times. As more interrelationship between state or municipal agencies becomes necessary, it would ill behoove us all to ignore the impact of these relationships on the fundamental rights of individuals.

The right to vote, and to have one's vote counted free of debasement or dilution, are fundamental interests that strike at the very heart of our system of government. Some infringements on the right to vote are subtle, but this Court has not hesitated to guard the right to vote zealously. "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U.S. 533, 562, 12 L.Ed. 2d 506, 527, 84 S.Ct. 1362 (1964). In *Reynolds,* this Court closely scrutinized and struck down a state apportionment statute which *diluted* the effectiveness of some citizens' votes. Petitioners submit that the right to vote can be as effectively denied or diluted by contractual arrangements, as by gerrymandering city lines or imposing qualification requirements on voters.

II.

THE COURT OF APPEAL SERIOUSLY MISCONSTRUED DECISIONAL LAW OF THIS COURT.

Aside from the obvious failure of the court below to apply the proper level of scrutiny, the Court of Appeal cited *Holt Civic Club v. City of Tuscaloosa* 439 U.S. 60, 58 L.Ed. 2d 292, 99 S.Ct. 383 (1978), for the proposition that there is no constitutional requirement that an extraterritorial extension of municipal powers be accompanied by the extension of the right to vote, because a political subdivision can legitimately restrict the right to vote to those who reside within its borders. App. "A", at A-13. This case is not material to the issue presented here, because in *Holt Civic Club* those residents outside the city limits of Tuscaloosa who were provided municipal services *never* had the right to vote for the body that was providing services, or for any other body. On the contrary, the voters of Rincon have had the right to vote for the governing body providing water services for over 25 years, and have had that right substantially erroded and diluted through the mechanism of the Merger Agreement.

The issue is not whether the City could provide water to those outside its city limits without giving them the right to vote, but whether the force and effect of the existing right to vote can be constitutionally diluted by the transfer of virtually all authority regarding the operation and direction of the water district to the City.

This Court has determined on a number of occasions that the right to vote once given is subject to all the protection afforded by the Constitution. This Court has stated in *Kramer v. Union Free School District,* 395 U.S. 621, 629, 23 L.Ed 2d 583, 590-591, 89 S.Ct. 1886 (1969), that the fact that a particular body need not have been elected is not determinative:

> [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, in *Hadley v. Junior College District,* 397 U.S. 50, 25 L.Ed. 2d 45, 90 S.Ct. 791 (1970), this Court applied the one man-one vote rule to an elected school board, although in an earlier case, *Sailors v. Board of Education,* 287 U.S. 105, 18 L.Ed. 2d 650, 87 S.Ct. 1549 (1967), this Court had confirmed that school boards need not be elected. Similarly, in *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 26 L.Ed. 2nd 523, 90 S.Ct. 1990 (1970) and *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.Ed. 2d 647, 89 S.Ct. 1897 (1969), this Court struck down restrictions on the voters who could vote in a bond election, although there is no constitutional requirement that bond issues obtain electoral approval.

The Court of Appeal, in its short and incomplete discussion of equal protection, relies solely on authority that has no relevance to, and is clearly not controlling, in the instant case. Petitioners respectfully submit that this grevious error in the application of the decisions of this Court justifies issuance of the writ in order to properly scrutinize the infringement on the right to vote caused by the Merger Agreement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of California Court of Appeal, Fourth Appellate District, Division One.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES O. HEWITT, et al.,

Plaintiffs and Respondents,

v.

RINCON DEL DIABLO MUNICIPAL WATER DISTRICT,

Defendant and Respondent,

CITY OF ESCONDIDO,

Defendant and Appellant.

FILED
JUN 18 1980
ROBERT L. FORD, Clerk
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4 Civ. No. 18677

(Super. Ct. No. N 8616)

Elroy F. Wiehl, City Attorney, and Jennings, Engstrand & Henrikson and Paul D. Engstrand, Larry L. Marshall and Wallace R. Peck, for Defendant and Appellant.

Hewitt & Shaw and Joseph L. Marshall and David N. Aitken for Plaintiffs and Respondents.

Bergman & Lisi and Joseph M. Lisi for Defendant and Respondent.

APPEAL from a judgment of the Superior Court of San Diego County declaring as void a written merger agreement between the City of Escondido and Rincon del Diablo Municipal Water District.

The petitioners James O. Hewitt and other named individuals (Hewitt) are taxpaying landowners and water users within the Rincon del Diablo Municipal Water District (Rincon). Rincon is a public agency organized in 1954 under the provisions of the Municipal Water District Act of 1911, and originally included lands located outside the boundaries of the City of Escondido (City). Because of annexations to the City, certain lands now lie within both Rincon and the City. However, a major portion of Rincon's territory still remains outside City's boundaries. For many years, City has owned and operated its own municipal water system. Prior agreements between City and Rincon have provided for certain interconnections between the two water systems and for the allocation of designated primary service areas for each competing district. These prior agreements have given rise to past litigation.

In July 1972, City and Rincon entered into an "Operational Merger Agreement," the immediate object of which was to settle a pending lawsuit. The long-range objective was to fully merge their respective water systems by interconnections into a single system, with the City being its exclusive operator, thereby eliminating duplication of costs with the hope of improving water service for all users. Before "full merger" as contemplated by the agreement, each party is obligated to undertake certain improvements and activities which included Rincon's connecting its system to the Vista flume.

Hewitt originally brought this action seeking to prevent Rincon from constructing the interconnection with the Vista flume and also for declaratory relief as to the validity of the merger agreement. The Vista flume interconnection project, however, was eventually shelved and this action is now limited to the validity of the merger agreement. Rincon now joins with Hewitt in attacking the validity of the 1972 agreement.

The questioned validity of the operational merger agreement has to do with its final phase and those provisions which deal with the rights and duties of the parties after "full operational merger" occurs. The parties conceded the agreement is not severable and, therefore, if these provisions are invalid, the entire agreement is invalid.

Full operational merger is defined in the merger agreement as follows:

> "*Full Operational Merger*
>
> "The management and operation by the City, pursuant to the terms of this Agreement, of both the Rincon and City systems as a single integrated water system, and including the collection and expenditure of all funds in connection therewith." (Exhibit 1, sec. II(f).)

The provisons applicable after full operational merger has occurred in section VI, paragraphs 19 through 26.[1]

---

[1] "19. *Implementation of Merger.* When all of the foregoing conditions have been met, arrangements shall be made by the administrative officers of the parties for reading all Rincon meters. This shall be done at the end of the month in which the full operational merger occurs, unless the parties shall work out a different time schedule. All charges for water delivered by Rincon prior to the time such meters are read, and all acounts receivable owed to Rincon at such time, shall remain the property of Rincon, and shall be included in future billings of the City for remittance to Rincon. After such meters have been read, all revenues from such users, and from other water service provided by the City under the terms of the full operational merger, shall belong to the City.

"20. *Service to Rincon Area.* When the full operational merger has occurred, the City shall assume the obligation of providing good water service to all lands and inhabitants within the boundaries of Rincon as they then exist, pursuant to the City's ordinances, rules, and regulations, except as they may be modified by the terms of this Agreement.

"21. *Water Rates and Charges.* The City shall adopt a uniform system of water rates, rate blocks, and charges which shall apply equally within Rincon and the City. Water rates and charges shall not be higher than necessary to raise the amounts required to properly operate and maintain the combined City and Rincon systems; to provide for necessary improvements and expansion, including the facilities designated as Phase II on Exhibit "A";

(Footnote continued on following page)

The basic issue involved is whether the merger agreement amounts to an improper delegation of legislative power by Rincon to City.

Municipal water districts are characterized as quasi-municipal corporations and, as such, have a broad grant of legislative policy-making power (*Henshaw v. Foster,* 176 Cal. 507; *Yribarne v. County of San Bernardino,* 218 Cal.App.2d 369). The doctrine prohibiting the delegation of legislative power is well established in California. Two Supreme Court cases cited in the briefs of both parties as the leading decisions in this area are *Kugler v. Yocum,* 69 Cal.2d 371, and *Bagley v. City of Manhattan Beach,* 18 Cal.3d 22.

(Footnote continued from preceding page)

and to service Rincon's Improvement District No. 1 bonds, Rincon's reimbursement agreements, bonds of the City issued for construction of the Treatment Plant, improvement of its water system, or acquisition of the Escondido Mutual Water Company system, and any other debt incurred for the purpose of constructing or installing water system facilities. It is the intent of the parties that such water rates and charges be used for the above purposes only, and not to finance any other City functions, since many water users may be outside of the boundaries of the City. Nothing in this Paragraph shall limit the ability of the City to impose a utility users tax, including a tax upon water use, within the City. The term 'water rates and charges' as used in this Paragraph shall not include the net power revenues of the City or any revenues received by the City from recreational activities at Dixon Reservoir and Lake Wohlford.

"22. *Service Outside City.* The City shall not make any special or higher rates, charges, or conditions of service applicable to users within Rincon who are located outside the City which are different from those applicable within the City. Nor shall the City require annexation to the City as a requirement of providing water service.

"23. *Existing Rincon Debt.* The City shall pay to Rincon sufficient funds to amortize its Improvement District No. 1 bonds, and meet its obligations under all existing refund contracts. Rincon agrees that no such new or additional contracts will be issued. A description of the outstanidng contracts and the amounts due thereon shall be provided to the City. Rincon shall notify the City from time to time of the specific amounts required under this Paragraph, which shall be paid by the City within thirty (30) days thereafter.

"24. *Rincon Employees.* The City shall offer employment to all permanent employees of Rincon in job classifications and at rates of pay reasonably comparable to those held by such employees at the time such

(Footnote continued on following page)

In *Kugler*, the Supreme Court held the proposed ordinance providing for the setting of salaries of Alhambra's firemen, at no less than the average of salaries received by firemen of the City of Los Angeles and the County of Los Angeles, was not an unlawful delegation of legislative power. The legislative policy was expressed in the ordinance itself, that policy being for wages to Alhambra's firemen to be on a parity with Los Angeles. Alhambra's city council still retained the responsibility for fixing salaries either at or above that minimum standard.

(Footnote continued from preceding page)
operational merger occurs. Rincon shall not make any changes in job classifications or rates of pay in anticipation of full operational merger, other than in the oridnary course of business.

"25. *Title to Systems.* Nothing in this Agreement shall affect or transfer title to the water systems owned respectively by Rincon and the City. The City agrees to maintain the Rincon system in good condition and repair, and to provide adequate casualty and liability insurance on such system and the operation thereof. Additions, betterments, extensions made to the Rincon system, and subdivision systems attached to the Rincon system and contributed by the developer, shall be the property of Rincon, subject to operation by the City under the terms of this Agreement. The City shall have the right to make such retirements from the Rincon system as may be appropriate under good engineering practices. The City shall purchase at Rincon's book value all Rincon field supplies, tools, and equipment used in connection with its water system, and such vehicles as Rincon may determine.

"26. *Continued Rincon Functions.* It is recognized that many Rincon landowners and users will probably still remain outside the City upon completion of the operational merger, and it is the responsibility, among others, of Rincon to protect the rights of such landowners and inhabitants under the terms of this Agreement. In addition, it is desirable for Rincon to maintain its water rights in the San Diego County Water Authority and otherwise to help protect the water supply to the Escondido Valley and assist in any way possible in the implementation of this Agreement.

"After full operational merger Rincon shall not construct, install or maintain any water storage, transmission or distribution facilities or provide other services except as above set forth, or as may be agreed upon by the parties. All water service within Rincon shall be rendered by City through its water system and through the Rincon water system pursuant to this Agreement. Rincon shall not transfer title to its water distribution system to any person, or any public or private corporation without the prior written consent of the City."

In discussing the doctrine prohibiting delegation of legislative power, the *Kugler* court stated:

> "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (*Kugler v. Yocum,* 69 Cal.2d 371, at pp. 376-377.)

Also at page 384:

> "The proposed Alhambra ordinance contains built-in and automatic protections that serve as safeguards against exploitive consequences from the operation of the proposed ordinance. Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. . . . '[T]he Legislature could reasonably assume that competition . . . coupled with . . . bargaining power . . . would provide a safeguard against excessive prices. . . .'"

And at page 384:

> "Only in the event of a total abdication of that power, through failure either to render basic policy decisions, or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation' . . . ."

In the present case, the merger agreement itself contains a clear expression of the fundamental policy decision by Rincon, which is to provide the most efficient and economical water service to Rincon at uniform rates for all inhabitants of Escondido Valley, including Rincon. There are sufficient built-in safeguards or standards as required by Kugler to assure this policy decision will be implemented and carried out, namely: City promises to assume the obligations of providing "good water service" to all lands and inhabitants within the boundaries of Rincon (see *ante,* § 20); the rates and charges to be

adopted by City *must* be uniform and *shall* apply equally within Rincon and the City (see *ante*, § 21); the water rates and charges will not be higher than necessary to raise the amounts required to operate and maintain the integrated system (see *ante*, § 21); the water rates and charges are to be used solely for the purpose of operating and maintaining the integrated water system, and for no other purpose (see *ante*, § 21); City shall not establish any different rates, or conditions of service, applicable to users within Rincon who are located outside City (see *ante*, § 22).

These standards or safeguards as expressed in the merger agreement will avoid any abuse or exploitation of Rincon's inhabitants, and will afford Rincon's board of directors with effective means to control City's performance as operator of the water system in order to achieve the ultimate objective of the agreement.

Hewitts' contention that there will be rates based upon expenses incurred or assumed by City, which have nothing to do with Rincon, assumes a fully integrated single water system will not benefit Rincon or result in improved water service at the lowest cost. This assumption is contrary to the findings of the contracting parties, as expressed in their declaration of intent and the other recitals in the merger agreement.

As pointed out by City, the citizens of Escondido are no more anxious to pay higher water rates than necessary to assure "good water service" than are those Rincon water users who are not citizens of the City.

This same argument was raised in the case of *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154, at page 158, footnote 2, and the Supreme Court, recognizing that nonresident customers of municipally owned utilities are not without rights to protection against unreasonable and discriminatory water rates or charges, stated at page 159:

> "[A] city which acquires the water system of another community incurs an obligation to deal fairly with its customers in that community and to provide them with reasonable service at reasonable rates. [Citation.] Such an acquiring city, as to the water dedicated to the use of the outside community, holds 'title as a mere trustee, bound to apply it to the use of those beneficially interested.' [Citation.] Consequently, the county can sue to enjoin rates which are themselves 'unreasonable, unfair, or fraudulently or arbitrarily established' [citation] or which discriminate without a reasonable and proper basis [citation]."

Full operational merger will not reduce to an "empty shell" nor result in a complete abdication of all its legislative power, as contended by Hewitt. Rincon will still continue to exist as a legal entity with a variety of powers and responsibilities. It still has power to acquire, construct and operate facilities for treatment and disposal of sewage, waste and storm water (Water Code, § 71670). It will still provide fire protection (Water Code, § 71680) and have authority to operate public recreational facilities (Water Code, § 71660). Its board of directors shall still determine the amounts necessary to be raised by taxation during the fiscal year and shall fix tax rates to be levied (Water Code, § 72093). Although the rates for water service will in effect be set by City, the board of directors has predetermined by the merger agreement those rates will be at cost and will not exceed the rates charged any other water user in the entire Escondido Valley area. Rincon will retain its membership with the San Diego Water Authority in order to help protect the water supply to Escondido Valley and assist in any possible manner in the implementation of the merger agreement (see *ante*, § 26).

Rincon also retains the power and ability to monitor and enforce the merger agreement to make certain City lives up to its assumed responsibilities, and if a substantial breach of contract occurs, Rincon has appropriate remedies in court.

The decision in *Bagley v. City of Manhattan Beach, supra*, 18 Cal.3d 22, does not prohibit delegation of legislative discretionary power unless specifically prohibited by statute. *Bagley* involved Government Code section 36506, which provided cities, by ordinance or resolution, shall fix the compensation of all appointive officers and employees. The Supreme Court held this statutory duty to fix compensation for its employees could not be delegated to arbitrators, stating where the Legislature has made it clear that a legislative body is to exercise discretionary power, the power is in the nature of a public trust and cannot be delegated *except as specifically authorized by statute.* (*Id.*, at p. 24.)

In the present case, Water Code section 71300[2] places all legislative power duties and privileges with the board of directors of Rincon, except for limited permissible delegations authorized by section 71301.[3] However, Water Code sections 71722[4] and 71723[5] specifically authorize Rincon to delegate its power to operate a water works. These sections authorize

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[2] "All powers, privileges, and duties of a district shall be exercised and performed by the board."

[3] "Any executive, administrative, and ministerial powers may be delegated and redelegated by the board to any of the offices created by this part or by the board."

[4] "A district may join with one or more public agencies, private corporations, or other persons for the purpose of carrying out any of the powers of the district, and for that purpose may contract with such other public agencies, private corporations, or persons to finance acquisitions, constructions and operations."

[5] "The contracts with other public agencies, private corporations, or persons may provide for contributions to be made by each party thereto, for the division and apportionment of the expenses of the acquisitions and operations, and for the division and apportionment of the benefits, the services, and products therefrom. Such contracts may also provide for an agency to effect the acquisitions and to carry on the operations, and shall provide in the powers and methods of procedure for such agency the method by which the agency may contract. Such contracts may contain such other and further covenants and agreements as may be necessary or convenient to accomplish the purposes thereof."

Rincon to join with any other public agency for the purpose of carrying out any of the district's powers and for this purpose specifically authorizes Rincon to contract with City to carry on its operations. Therefore, there is no legislative intent *limiting* delegability as was true in *Bagley*, but, on the contrary, there is express legislative intent *authorizing* delegability pursuant to these two Water Code sections.

The merger agreement is a contract of cooperation by two public agencies who have joined together to form one integrated water system, with each party contributing certain physical assets or property and agreeing to perform certain activities to integrate their respective water systems. Upon full integration or, as the agreement states, "after full operational merger," the combined systems will be operated exclusively by one agency for the benefit of both parties. This is exactly what was intended by Legislature when it enacted sections 71722 and 71723.

This type of statute is not unusual in California. In construing a similar type of statute entitled "an act providing for the joint exercise of powers by counties, by municipalities, or by municipalities and counties," the California Supreme Court in *City of Oakland v. Williams* (1940) 15 Cal.2d 542, stated at page 549:

> "The 1921 statute merely provides a procedure whereby this power may be exercised by cooperative action. This type of statute is not unusual in this state. In other instances, the legislature has authorized two or more governmental agencies to contract, whereby one is empowered to perform a governmental function for another. [Citations.] In so legislating the legislature recognizes that there are certain situations and problems that can best be met and solved by several governmental agencies acting jointly and permitting one of their number to act for all."

The merger agreement is not fatally defective merely because it does not specify a definite time for its termination. The contract will be construed to continue so long as necessary

to carry out the reasonable intentions of the parties. (14 Cal.Jur.3d Contracts, § 59; *Haggerty v. Warner*, 115 Cal. App.2d 468.)

The trial court determined, if the merger agreement was otherwise valid, it should nevertheless have been approved by a majority of the voters of Rincon as required by Water Code section 71699,[6] and no such approval was sought or obtained.

This section was enacted in 1970, two years before the merger agreement and, pertinent to this case, provides in substance no publicly owned utility shall commence to provide water service to land within a municipal water district which is subject to an indebtedness incurred to provide similar services without first securing approval of at least a majority of votes from voters at a special election held within the district to be served.

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[6] "No publicly owned utility shall commence to provide any water service for, on, or to any land within a municipal water district which is subject to (1) the lien of a bonded indebtedness incurred by the district for the purpose of providing a service similar to that which the utility proposes to provide or (2) a lien of an indebtedness arising under any contract between the district and the United States of America incurred or contracted by the district for the purpose of providing water service; provided, that a majority of the voters voting at an election within the district have approved the incurrence of the indebtedness and, provided further, that the district has water available and is ready, able, and willing to serve such land.

"However, a publicly owned utility may commence to provide service, otherwise prohibited, upon either of the following conditions:

"(a) In any portion of such a municipal water district proposed to be served by the publicly owned utility in which the total number of registered voters residing therein is less than 12, and in which the municipal water district (1) receives the written consent of at least a majority of the owners of real property holding at least a majority in value of the real property and (2) consents to the service by resolution.

"(b) In any portion of such a municipal water district proposed to be served by the publicly owned utility in which the total number of registered voters residing therein is 12 or more, and in which at least a majority of the voters voting on the proposition shall have voted at a special municipal water district election to permit such service within that portion of the district. The election shall be called and held within that portion of the district in the same manner as an initiative measure pursuant to Section 71530."

However, the following section 71700[7] provides the exclusive remedy for a violation of section 71699, and *by necessary implication* authorizes commencement of water service contrary to section 71699 by reimbursement to the district serviced of its previously incurred indebtedness.

The obvious intent of the Legislature was to preserve financial integrity and insure repayment of indebtedness incurred to provide water service. This has been accomplished by the merger agreement in section 21, which obligates City to service Rincon's Improvement District No. 1 bonds, and Rincon's reimbursement agreements.

Any technical noncompliance with section 71699 would also be cured by the "First Validation Act of 1973." This act is not codified but is found in Statutes of California 1973, chapter 38. It expressly applies to public bodies, including cities and municipal water districts.

Pertinent sections of the act provide:

> "Sec. 4. All acts . . . taken by any public body . . . under color of any law . . . for the consolidation, merger, or dissolution of any public bodies are hereby confirmed, validated, and declared legally effective. . . ."
>
> "Sec. 6. (a) The foregoing provisions of this act shall operate to supply such legislative authorization as may be necessary to validate any such acts and proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.

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[7] "Any publicly owned utility which commences to provide any water service for, on, or to any land within a municipal water district which is providing service to the land and which land at the commencement of such service is subject to the lien of a bonded or contract indebtedness with revenues pledged for their payment, shall reimburse the district from the water revenues derived from charges made for service to such land, the amount which would have been paid by the district from water revenues for such bond or contract payments."

"(b) The foregoing provisions of this act shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

The case decisions recognize Legislature, [sic] by means of validating acts, may subsequently ratify whatever it could have originally authorized so that an act ratified will be equivalent to an act performed under an original grant of power, provided no constitutional obstacles or vested rights are involved. (*Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal. App.2d 127, 139; *Rock Creek W. Dist. v. County of Calaveras*, 133 Cal.App.2d 141, 146; *People ex rel. Desert etc. Water Dist. v. Coachella etc. Water Dist.*, 232 Cal.App.2d 685, 697.)

Validation acts are not limited to correcting procedural irregularities unless expressly so limited (*City of Fairfield v. Hutcheon*, 33 Cal.2d 475, 478).

Since Legislature could have originally provided what now is necessarily implied by section 71770, namely, that a municipality may commence providing water service to land already located within an existing water district upon payment of its bonded indebtedness without voter approval, such authority is supplied by the 1973 validation act. No vested right or violation of due process is involved.

There is no disenfranchisement of the voters of Rincon and no denial of equal protection of the law. The United States Supreme Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 [99 S.Ct. 383], makes it clear there is no constitutional requirement that extraterritorial extension of the right to vote must accompany extraterritorial extension of municipal powers, it being consistent with equal protection requirements for a government unit to restrict the right to vote to those who reside within its borders. This principle was also recognized by the California Supreme Court in *County of Inyo v. Public Utilities Commission, supra*, 26 Cal.3d 154.

The merger agreement does not substitute the city council of Escondido for the board of directors of Rincon, as analogized by Hewitt. The Rincon board of directors with its remaining duties and powers is unaffected by the agreement which deals only with the maintenance and operation of the water system. Rincon's board of directors will continue to exist and function by exercising all of its powers except the day-to-day operation of the water system.

Having found the merger agreement is valid pursuant to California case decisions and expressly authorized by the California Water Code, it is not necessary to determine if the agreement is also validated by the Joint Powers Act (Gov. Code, §§ 6500-6513).

Judgment reversed.

CERTIFIED FOR PUBLICATION.

Hamrick
J.*

WE CONCUR:

Cologne
Acting P.J.

Staniforth
J.

* Superior Court Judge under assignment by the Chairperson of the Judicial Council.

APPENDIX B

OPERATIONAL MERGER AGREEMENT

THIS AGREEMENT made this ..... day of ....., 1972, between the CITY OF ESCONDIDO (hereinafter called the "City"), and the RINCON DEL DIABLO MUNICIPAL WATER DISTRICT (hereinafter called "Rincon").

I

RECITALS

1. The City is a municipal corporation organized and exisiting under the general laws of the State of California. For many years the City has owned and operated its own municipal water system, and now also controls and operates the water system of the Escondido Mutual Water Company, pursuant to an Operating Agreement signed by the Mutual on April 29, 1971. The City has further entered into agreements to acquire the assets of the Mutual through the purchase of outstanding shares of common stock of the company, pursuant to a tender offer dated June 19, 1970, as supplemented September 16, 1970. City became a separate member agency of the San Diego County Water Authority (hereinafter SDCWA) on October 9, 1950, and was simultaneously annexed to the Metropolitan Water District of Southern California (hereinafter MWD). By reason thereof, City purchases water from SDCWA as needed.

2. Rincon is a public agency, organized in 1954 under the provisions of the Municipal Water District Act of 1911. Rincon originally embraced only lands situated outside the boundaries of the City. Because of annexations to the City, certain lands now lie both within Rincon and the City. However, the major portion of Rincon still remains outside of the City, and embraces the service area of the Escondido Mutual Water Company. Rincon became a separate member agency of SDCWA on June 14, 1954, and was simultaneously annexed to MWD. By reason thereof, Rincon purchases water from SDCWA as needed.

Rincon owns and operates a retail water system, and historically has sold water on a wholesale basis to the Escondido Mutual Water Company. Two improvement districts have been formed within Rincon: Improvement District No. 1, for which General Obligation Bonds in the sum of Six Hundred Fifty Thousand Dollars ($650,000.00) were issued in 1955; and Improvement District "A," organized for a purpose other than the issuance of bonds.

3. On September 5, 1963, the City and Rincon entered into an agreement in contemplation of the early acquisition by the City of the water system of the Escondido Mutual Water Company. That agreement has been supplemented and amended by agreements dated November 20, 1963; May 8, 1968; and October 29, 1968. The 1963 agreement, as amended, represented an effort to provide the most efficient and economical water service to the entire Escondido Valley, and thereby provided for the allocation of primary service areas between the City and Rincon, for certain interconnections between the two water systems, and for appropriate payment arrangements. Disagreements have now arisen over the interpretation and performance of such agreement; and on July 16, 1971, Rincon filed an action entitled *Rincon del Diablo Municipal Water District v. City of Escondido*, San Diego Superior Court No. 32596, concerning such agreement. One of the purposes of this Agreement is to resolve the disputes which led to the filing of this action.

4. The longer-range purpose of this Agreement, however, is to further the original objectives of the 1963 agreement by providing for an orderly operational merger of the Rincon and City systems, including that of the Escondido Mutual Water Company. By such cooperation, as provided in this Agreement, the parties believe that the level of water service to users within the City and Rincon can be improved, and the overall cost thereof can be reduced. Both parties now contemplate major capital improvements in order to supply filtered water. Substantial improvements can be deferred by supplying water

to Rincon from the Treatment Plant to be built by the City at Dixon Dam. The parties further intend that all future planning and construction for their respective water systems will take into account the full operational merger provided for in this Agreement.

II

DEFINITIONS

5. For purposes of this Agreement, the following terms shall be defined as set forth:

(a) "*Good Water Service.*" Supplying water for domestic, agricultural, industrial, municipal, recreational, or other beneficial uses, in accordance with generally accepted engineering standards and practices, in compliance with all requirements of public health authorities and all other public agencies having jurisdiction, and furnishing a level of service at least equal to that now provided by the City and Rincon.

(b) "*Treatment Plant.*" The water treatment plant to be constructed by the City and Vista Irrigation District at Dixon Dam, including plant structures, filters, piping, site work, wash water supply and disposal facilities, interconnections with existing facilities, clear water storage and all other necessary related facilities at or adjacent to the site.

The Treatment Plant shall have an initial capacity of at least 37.5 million gallons per day to treat water from Dixon Reservoir, including both local waters and water supplied by the Metropolitan Water District of Southern California through the San Diego County Water Authority.

(c) "*Operating Costs" of Treatment Plant.* Operating costs for the Treatment Plant shall include administration,

operation, maintenance, and repair costs of the Plant including:

(1) Chemicals.

(2) Utilities, other than power.

(3) Power for all purposes, excepting:

(i) Power costs for pumping water from the hydraulic elevation of the Treatment Plant to Dixon Reservoir.

(ii) Power costs for pumping station in the supply line from the First San Diego County Water Authority Aqueduct to Dixon Reservoir.

(4) Consumable supplies, tools, materials, and the cost of equipment not exceeding $3,500.00 for each purchase.

(5) Direct labor, including all payroll taxes and fringe benefits (which shall not be greater than those regularly provided by Escondido).

(6) The cost of repairs and outside services required for maintenance and operation.

(7) Miscellaneous maintenance supplies such as paint, grease and the cost of equipment maintenance.

(8) Landscape maintenance.

(9) Administrative costs (including liability but not casualty insurance) directly chargeable to maintenance and operation of the Treatment Plant (as agreed by the parties from time to time in Operating Memoranda).

If the cost of a single purchase or repair exceeds $3,500.00, it shall be considered an addition to the Treatment Plant cost, and shall be added to the total expenditures for the Treatment Plant for payment purposes of Section 16(b).

(d) *Rincon's "Water System" or System.* The entire water transmission and distribution system owned and operated by Rincon, including the portion of such system located within Improvement District No. 1 and within Improvement District "A."

(e) *City's "Water System" or "System."* The entire water transmission and distribution system owned and operated by the City, including the water system of the Escondido Mutual Water Company, so long as it is managed and operated by the City.

(f) *"Full Operational Merger."* The management and operation by the City, pursuant to the terms of this Agreement, of both the Rincon and City systems as a single integrated water system, and including the collection and expenditure of all funds in connection therewith.

III

PROVISIONS APPLICABLE BEFORE OPERATIONAL MERGER BECOMES FULLY EFFECTIVE

IT IS HEREBY AGREED, in consideration of the mutual covenants of the parties, as follows:

6. *Additional Rincon Storage.* Within three (3) years from the date of this Agreement, Rincon will construct from funds on hand, together with other funds to be raised by taxation if necessary, a storage reservoir for its system of not less than two million (2,000,000) gallons capacity. The general location for such reservoir, in either the northwest or southwest portion of the Rincon system, shall be determined by Rincon in order to best meet its own system requirements. The elevation and precise location of the reservoir, however, shall be subject to City approval. Rincon will also consult with the City with respect to plans and specifications for the reservoir.

7. *I.D. "A" Interconnection.* At such time as Rincon may determine, it shall have the right to interconnect its system within Improvement District "A" to the City system, and

thereafter, whenever Rincon requests, the City shall supply the water necessary to provide good water service to such improvement district. At least two (2) such interconnections shall be permitted, and additional interconnections shall be made if the engineers for the City and Rincon determine that they are necessary. The precise location of all such interconnections, and the plans and specifications therefor, including metering devices, shall be determined by the engineers for Rincon, subject to approval by the City. All such work shall be done by Rincon at its expense. Rincon will give the City at least ten (10) days' notice before any construction is commenced. The tentative locations of the interconnections are marked as Interconnection A-1 and Interconnection A-2 on the map attached as Exhibit "A" and by reference made a part hereof. [Exhibit omitted]

8. *City Treatment Plant.* The City will continue with the planning, funding, and construction of its proposed Treatment Plant. The utilization of such Treatment Plant to furnish filtered water to all users within the City and Rincon systems is one of the prime motivations for this Agreement, and the City will diligently pursue completion of such plant at the earliest practicable date. It is recognized that the City's presently authorized bonds are insufficient to construct such plant, provide the improvements called for under this Agreement, and satisfy the City's obligations with respect to acquisition of the Escondido Mutual Water Company. For this reason, additional federal and state grants are now being sought, and, at the City's request, Rincon will lend its assistance in seeking approval of such grant applications. In the event the City's authorized bonds, together with such state and federal assistance as may be received, are insufficient to construct the Treatment Plant, satisfy its Mutual obligations, and complete the other improvements required by this Agreement, the City will seek additional financing. The City will not change its existing plans for construction or financing of the Treatment Plant without consultation with Rincon. If the City has been unable to construct the Treatment Plant by the time Rincon may be required by

public health authorities to deliver filtered water to its users, then Rincon shall be free to take such action as may be necessary to obtain a filtered water supply.

9. *Improvements to City System.* Integration of the City and Rincon systems will require certain improvements to the City system in order to provide good water service to users within both Rincon and the City, including maintenance of substantially the same water pressures which now exist. The major items of such construction are shown upon Exhibit "A," and are delineated thereon as Phase I Facilities. It is recognized that these facilities do not represent final engineering determinations, and that the precise locations of such transmission lines, their sizing, timing, and other such facilities as may be required will be determined by the engineers for the City and reviewed by Rincon after further study. All such facilities will be constructed by the City at City expense and in sufficient time to enable the City to meet its obligations hereunder.

10. *Adjustment to Rincon Rate Structure.* Within the fiscal year following execution of this Agreement, Rincon agrees to adjust the size of its rate blocks to coincide with the City's present rate block structure; that is, Rincon will adopt a single rate for the first eighty thousand (80,000) gallons of water used within a two (2) months' period, a lower rate for the next one million four hundred twenty thousand (1,420,000) gallons of water, and a lower rate for all water used over one million five hundred thousand (1,500,000) gallons. In addition, if feasible, Rincon will lower its tax rates within Improvement District No. 1 so as to raise only those funds necessary to service its bonded debt, and will study the possibility of meeting even this obligation from rates and charges.

11. *Consolidation and Amendment of Prior Agreements: Service Areas, Joint Use of Facilities, Payments.* In addition to the agreements specified in Paragraph 3 hereof, the parties have also entered into agreements dated May 1, 1957, July 17, 1957, and July 20, 1960. In the aggregate, these agreements

cover, among other subjects, the establishment of primary service areas for Rincon and the City, provision for joint use of certain facilities, accounting procedures and certain requirements for payments. The parties now wish in accord with the terms of this Agreement to augment, amend and consolidate the principal provisions concerning these subjects as set forth below. To the extent that the prior agreements of the parties may be in conflict with any of the following, such agreements or any provisions thereof are hereby modified and superseded.

(a) Rincon shall have the exclusive right, irrespective of the election of any owner, to provide water service to all new customers and users within its primary service area, as shown on the map attached as Exhibit "B" and by reference made a part hereof. [Exhibit omitted]

(b) The City shall have the exclusive right, irrespective of the election of any owner, to provide water service to all new customers and users within its primary service area, as shown upon Exhibit "B".

(c) Each party shall continue to supply such existing customers and users as it now serves within the primary service area of the other party.

(d) in addition to the interconnections between the Rincon and City systems provided for in prior agreements, and in addition to the interconnections otherwise provided for herein, and in order to eliminate unnecessary duplication of facilities, each party shall have the right, to the extent that water supply is available, to connect metered customer services to, and to supply such users through, any facilities of the other party which may be located within its service area as shown on Exhibit "B". Rincon shall also have the right to use, as may be required for the operation of its system, that certain 31-inch transmission main connecting its system to the San Diego County Water Authority Aqueduct, as described in Instrument No. 156920 recorded November 7, 1956, in Book 6332, page 199, Official Records of San Diego County.

(e) Once each month an accounting will be made of the quantities of water delivered to the City or its customers through Rincon facilities, and to Rincon or its customers through City facilities. In areas where the quantities of water so delivered are determined not by a master meter but by individual customer meters, an additional amount of 5% shall be added for system losses. Before the end of the month, each party will report to the other the quantities of water so through individual meters, or if such meters are read bimonthly, estimates may be used and adjusted the following month.

(f) The parties will report monthly, or as otherwise required, to the San Diego County Water Authority the quantities of water delivered through the facilities of the other party. Each party will pay the Authority directly at rates charged by the Authority for the use made of the water which such party or its customers received through the facilities of the other. If for any period of time the City should supply Rincon or its customers with water other than that provided by the Authority, Rincon shall pay the City for such water at Authority rates applicable to the use made of the water.

(g) In addition to payments required for the water as set forth in Paragraph 11 (f) above, each party shall be liable to the other for a delivery charge of two dollars ($2.00) per acre foot, and a chlorination charge of one dollar ($1.00) per acre foot for unfiltered water, for the quantities of water which such party or its customers receive through the facilities of the other. In addition, the City shall also pay Rincon on July 1 of each year the sum of five thousand one hundred forty-four dollars ($5,144.00) until such time as Rincon's Improvement District No. 1 bonds are fully paid. The foregoing payments shall be the sole and exclusive charges made for the use of facilities and delivery of water, except for treated water as provided in Paragraph 16.

(h) In addition to the foregoing, the City shall pay to Rincon upon execution of this Agreement the sum of six thousand six hundred forty-five dollars ($6,645.00) as the amount due under Paragraph VII of the September 5, 1963, agreement. Annually thereafter, commencing July 1, 1972 for the period of July 1, 1971 through June 30, 1972, and continuing until the full operational merger occurs, the City shall pay Rincon an amount equal to the proportion of Rincon's total overhead for the operation of the parent district that the assessed valuation of the City's service area within Rincon bears to the assessed valuation of the entire Rincon district. To the extent of the above obligation, the City will receive a credit of $2.00 per acre foot for the water delivered by Rincon through the master meter on Ash Street near Vista Way, for which a delivery charge has been made in accordance with paragraph 11 (g). This provision supersedes other liability of the City under Paragraph VII of the September 5, 1963, agreement.

(i) In any area served by Rincon which lies within the boundaries of the City, Rincon, as part of its collection of water rates and charges, will mail and collect, for the account of the City, such statements for sewer service charges as may be made by the City. The City will reimburse Rincon for its actual costs in performing such service.

(j) Rincon agrees that it will require that all developers' plans and specifications for water systems constructed within its primary service area and also within the City shall meet the approval of the City Engineer. With respect to developments outside the City, Rincon will consult with the City Engineer but the parties recognize that County requirements may be controlling.

12. *Dismissal of Action.* Upon execution of this Agreement, Rincon will dismiss its action against the City, *Rincon Del Diablo Municipal Water District v. City of Escondido,* San Diego Superior Court No. 326596; and each party will bear its own costs.

13. *Operation of Systems.* Except as otherwise provided herein, and until a full operational merger occurs, each party shall operate, manage, maintain, repair, and improve its water system without control by the other party. Each party agrees to keep its system in good condition and repair and to provide such improvements as may be necessary to provide good water service. All deliveries of water by one party to the other shall be metered, and records thereof shall be available for inspection by the other party upon reasonable request. Operational procedures for reading the meters, billing, ordering water, and controlling valves and interconnections between the systems shall be developed by the administrative officers of the parties.

IV

PROVISIONS APPLICABLE UPON COMPLETION OF TREATMENT PLANT, WHETHER OR NOT FULL OPERATIONAL MERGER THEN OCCURS

14. *Rincon Interconnection to Vista Flume.* Upon completion and operation of the Treatment Plant, the City shall supply Rincon with filtered water from the Vista Flume. The interconnection thereto from the existing Vista Avenue thirty-inch (30″) main shall be essentially as shown upon Exhibit "A." Such interconnection, and the pumping station and metering facilities necessary to supply such water to Rincon's Improvement District No. 1 system, shall be constructed by and at the expense of Rincon. The facilities necessary to deliver such water and provide good water services shall be constructed by and at the expense of Rincon. The designs, plans, and specifications shall be determined and prepared by the engineers for Rincon and approved by the City. Rincon shall operate and maintain such facilities at its expense until such time as the full operational merger has taken place.

15. *Additional Integration of City and Rincon Systems.* Upon completion and operation of the Treatment Plant, additional interconnections between the City and Rincon systems will be made so as to provide Rincon users with filtered water. Such interconnections and pressure-reducing stations shall be essentially as shown upon Exhibit "A". It is recognized that such facilities shown thereon do not represent final engineering determinations, and that the precise locations and nature of such interconnections will be determined by the engineers for the City and Rincon after further study. Such construction shall be done by the City. Rincon and the City shall share equally the costs of all such interconnections and metering facilities. The cost of all pressure-reducing stations shall be paid by the party on whose system any such station is constructed. If the conditions of Paragraph 18 have been fulfilled, then all costs incurred under the provisions of this Paragraph shall be paid by the City.

16. *Payment for Treated Water.* Upon completion and operation of the Treatment Plant, the City shall supply Rincon with treated water, through the facilities provided for in Paragraphs 7, 14 and 15. Rincon shall pay the City for such water upon the following bases:

(a) Rincon's pro rata share of the operating costs of the Treatment Plant, based upon the ratio which water delivered to Rincon bears to the total quantity of water treated at the Treatment Plant.

(b) Rincon's pro rata share of the annual amounts required to service City bonds in a sum equal to the total expenditures by City for the Treatment Plant, less any State and Federal grants received therefor, based upon the ratio which water delivered to Rincon bears to the total quantity of water treated at the Treatment Plant.

(c) A charge for evaporation, based upon two percent of the quantity of water delivered from the Treatment Plant to Rincon, and calculated at SDCWA rates applicable to the use made of the treated water.

These sums shall be in addition to the payments required by Paragraph 11. At such time as the full operational merger occurs, as provided in Paragaph 18, the payment provisions of this Paragraph 16 shall no longer apply.

17. *Claims of Others.* The City agrees to hold Rincon harmless from any liability, loss, or expense arising from any claims made by the Vista Irrigation District for the delivery of water from the Treatment Plant to Rincon, and through the Vista Flume, and against the claims of any party, including any Indians or Indian tribe, arising from the delivery of local waters to Rincon.

V

CONDITIONS OF FULL OPERATIONAL MERGER

18. *Full Operational Merger.* The full operational merger of the Rincon and City systems shall occur upon completion of all the following conditions:

(a) Construction and operation of the Treatment Plant, and construction of the facilities necessary to supply filtered water to Rincon, as required by Paragraphs 14 and 15.

(b) Construction of those improvements to the City system as described in Paragraph 9 as necessary to provide and to continue to provide good water service.

(c) Distribution by the City to the shareholders of the Escondido Mutual Water Company, or to the Indian claimants, of the amounts agreed or ordered to be paid by the City in connection with the acquisition of the mutual properties within Rincon or transfer of title to such assets to the City by any other means.

(d) Payment to Rincon of the sum of Fifty Thousand Dollars ($50,000.00) to be used as a reserve for the amortization of Improvement District No. 1 bonds. Interest earned on such payment shall accrue to the credit of the City. Upon full payment of such outstanding bonds, and upon fulfillment by the City of all the terms of this Agreement, such amount shall be returned to the City.

VI

PROVISIONS APPLICABLE AFTER FULL OPERATIONAL MERGER HAS OCCURRED

19. *Implementation of Merger.* When all of the foregoing conditions have been met, arrangements shall be made by the administrative officers of the parties for reading all Rincon meters. This shall be done at the end of month in which the full operational merger occurs, unless the parties shall work out a different time schedule. All charges for water delivered by Rincon prior to the time such meters are read, and all accounts receivable owed to Rincon at such time, shall remain the property of Rincon, and shall be included in future billings of the City for remittance to Rincon. After such meters have been read, all revenues from such users, and from other water service provided by the City under the terms of the full operational merger, shall belong to the City.

20. *Service to Rincon Area.* When the full operational merger has occurred, the City shall assume the obligation of providing good water service to all lands and inhabitants within the boundaries of Rincon as they then exist, pursuant to the City's ordinances, rules, and regulations, except as they may be modified by the terms of this Agreement.

21. *Water Rates and Charges.* The City shall adopt a uniform system of water rates, rate blocks, and charges which shall apply equally within Rincon and the City. Water rates and charges shall not be higher than necessary to raise the amounts required to properly operate and maintain the combined City and Rincon systems; to provide for necessary improvements and expansion, including the facilities designated as Phase II on Exhibit "A"; and to service Rincon's Improvement District No. 1 bonds, Rincon's reimbursement agreements, bonds of the City issued for construction of the Treatment Plant, improvement of its water system, or acquisition of

the Escondido Mutual Water Company system, and any other debt incurred for the purpose of constructing or installing water system facilities. It is the intent of the parties that such water rates and charges be used for the above purposes only, and not to finance any other City functions, since many water users may be outside of the boundaries of the City. Nothing in this Paragraph shall limit the ability of the City to impose a utility users tax, including a tax upon water use, within the City. The term "water rates and charges" as used in this Paragraph shall not include the net power revenues of the City or any revenues received by the City from recreational activities at Dixon Reservoir and Lake Wohlford.

22. *Service Outside City.* The City shall not make any special or higher rates, charges, or conditions of service applicable to users within Rincon who are located outside the City which are different from those applicable within the City. Nor shall the City require annexation to the City as a requirement of providing water service.

23. *Existing Rincon Debt.* The City shall pay to Rincon sufficient funds to amortize its Improvement District No. 1 bonds, and meet its obligations under all existing refund contracts. Rincon agrees that no such new or additional contracts will be issued. A description of the outstanding contracts and the amounts due thereon shall be provided to the City. Rincon shall notify the City from time to time of the specific amounts required under this Paragraph, which shall be paid by the City within thirty (30) days thereafter.

24. *Rincon Employees.* The City shall offer employment to all permanent employees of Rincon in job classifications and at rates of pay reasonably comparable to those held by such employees at the time such operational merger occurs. Rincon shall not make any changes in job classifications or rates of pay in anticipation of full operational merger, other than in the ordinary course of business.

25. *Title to Systems.* Nothing in this Agreement shall affect or transfer title to the water systems owned respectively by Rincon and the City. The City agrees to maintain the Rincon system in good condition and repair, and to provide adequate casualty and liability insurance on such system and the operation thereof. Additions, betterments, extensions made to the Rincon system, and subdivision systems attached to the Rincon system and contributed by the developer, shall be the property of Rincon, subject to operation by the City under the terms of this Agreement. The City shall have the right to make such retirements from the Rincon system as may be appropriate under good engineering practices. The City shall purchase at Rincon's book value all Rincon field supplies, tools, and equipment used in connection with its water system, and such vehicles as Rincon may determine.

26. *Continued Rincon Functions.* It is recognized that many Rincon landowners and users will probably still remain outside the City upon completion of the operational merger, and it is the responsibility, among others, of Rincon to protect the rights of such landowners and inhabitants under the terms of this Agreement. In addition, it is desirable for Rincon to maintain its water rights in the San Diego County Water Authority and otherwise to help protect the water supply to the Escondido Valley and assist in any way possible in the implementation of this Agreement.

After full operational merger Rincon shall not construct, install or maintain any water storage, transmission or distribution facilities or provide other services except as above set forth, or as may be agreed upon by the parties. All water service within Rincon shall be rendered by City through its water system and through the Rincon water system pursuant to this Agreement. Rincon shall not transfer title to its water distribution system to any person, or any public or private corporation without the prior written consent of the City.

VII

GENERAL

27. *Requirement of Approval.* Where this Agreement calls for the approval of either party, the granting of such approval shall be considered in the light of sound engineering practices and the objectives of this Agreement, and shall not be unreasonably withheld.

28. *Continued Cooperation.* The parties recognize that conditions may well change over the years covered by this Agreement, and it is difficult to foresee all of the problems which can arise. Continued cooperation between the parties will be essential if the merger is to be most effectively accomplished, and the basic objective of providing the most efficient water service to the entire area is fully achieved.

EXECUTED this 18th day of July, 1972.

CITY OF ESCONDIDO

ATTEST:

By:_____
Mayor

_____
City Clerk

RINCON DEL DIABLO
MUNICIPAL WATER
DISTRICT

ATTEST:

By:_____
President

_____
Secretary

APPENDIX C

FILED
Robert D. Zumwalt, Clerk
SEP 27 1978
BY R. C. WETZEL Deputy

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

NORTH COUNTY BRANCH

JAMES O. HEWITT, FRANK PAVEL, MARILYN PAVEL, LLOYD COTTINGHAM and WOODROW W. SANDERSON,

Petitioners,

v.

RINCON DEL DIABLO MUNICIPAL WATER DISTRICT, CITY OF ESCONDIDO,

Respondents.

NO. N 8616

JUDGMENT (CCP § 632)

This cause came on regularly for trial on June 12 and June 13, 1978, in Department A of the above entitled Court, the Honorable Wesley B. Buttermore, Judge, presiding, sitting without a jury. Joseph L. Marshall of Hewitt & Shaw and David N. Aitken appeared on behalf of Petitioners, J. M. Lisi of Bergman & Lisi appeared on behalf of Respondent Rincon Del Diablo Municipal Water District, and Paul D. Engstrand and Larry L. Marshall of Jennings, Engstrand & Henrikson appeared on behalf of Respondent City of Escondido.

Evidence, in the form of stipulated facts, was introduced on behalf of all parties, and the cause was argued and submitted for decision; the Court, having caused to be made and filed herein its written Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED that the Operational Merger Agreement of July 18, 1972, between the City of Escondido and Rincon Del Diablo Municipal Water District is invalid and void from its inception.

DATED: SEP 27 1978

W. BUTTERMORE

JUDGE OF THE SUPERIOR COURT
WESLEY B. BUTTERMORE, JR.

JUDGMENT ENTERED ON ....., 1978, IN VOLUME ..... OF THE JUDGMENT BOOK, PAGE ..... .

CLERK:

By:_____
Deputy

C-3

FILED
Robert D. Zumwalt, Clerk
SEP 27 1978
By R. C. WETZEL, Deputy

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

(NORTH COUNTY BRANCH)

JAMES O. HEWITT, FRANK PAVEL, MARILYN PAVEL, LLOYD COTTINGHAM and WOODROW W. SANDERSON,

Petitioners,

v.

RINCON DEL DIABLO MUNICIPAL WATER DISTRICT, CITY OF ESCONDIDO,

Respondents.

NO. N 8616

FINDINGS OF FACT AND CONCLUSIONS OF LAW (Cal. Rules of Court, Rule 232)

The above-entitled cause came on regularly for trial on June 12 and June 13, 1978, in Department A of the above-entitled court, the Honorable Wesley B. Buttermore, Judge, presiding, without a jury, and was actually tried on those dates. Joseph L. Marshall of Hewitt & Shaw and David N. Aitken appeared on behalf of Petitioners, J. M. Lisi of Bergman & Lisi appeared on behalf of Respondent Rincon Del Diablo Municipal Water District, and Paul D. Engstrand and Larry L. Marshall of Jennings, Engstrand & Henrikson appeared on behalf of Respondent City of Escondido.

Evidence, in the form of stipulated facts, was introduced on behalf of all parties, and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel, and being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds:

1. An "Operational Merger Agreement" (hereinafter "Merger Agreement") dated July 18, 1972, was entered into between City of Escondido (hereinafter "City") and the Rincon Del Diablo Municipal Water District (hereinafter "Rincon") on or about that date. The Agreement provided for an eventual full "operational merger" of the two water systems operated by City and Rincon.

2. Petitioners are land owners and water users within Rincon.

3. The Merger Agreement required certain pre-merger activities of each of the parties, including an interconnection to the Vista Flume to be constructed by Rincon.

4. Petitioners brought this action originally seeking to prevent the implementation and construction of the interconnection to the Vista Flume. That project has since been shelved. Petitioners ultimately sought declaratory relief concerning the validity of the Merger Agreement and the legality of the merger of the two systems as contemplated by the Merger Agreement.

5. Rincon's governing body consists of a board of directors who exercise executive and administrative powers. Resident voters of the district are entitled to vote for members of the governing board of directors.

6. The vast majority of the constituents of Rincon reside outside the city limits of Escondido.

7. The City of Escondido, by and through its water department, is a publicly owned utility.

8. People who live outside of the City of Escondido do not have the right to vote for members of the City Counsel of the City of Escondido.

9. The consent given by Rincon for delivery, sale and service of water within the Rincon Del Diablo Municipal Water District was limited to the primary service areas of City, as established in earlier agreements (Respondent Escondido's Exhibits 2-D and 2-G), executed in 1963 and 1968, respectively. That prior consent, affirmed as limited by Rincon Ordinance 24, did not include the entire Rincon Water District or any areas where City did not then provide water service.

10. Water Code § 71699 was enacted in 1970, two years before execution of the Merger Agreement.

11. The 1972 Merger Agreement called for Escondido to provide water service for, on, and to Improvement District No. 1 of Rincon.

12. From 1970 to present, said Improvement District No. 1 was, and continues to be, subject to the lien of a bonded indebtedness incurred by Rincon for the purpose of providing water service for, on, and to said land within the boundaries of Improvement District No. 1.

13. Said bonded indebtedness was incurred after approval of a majority of the voters who reside within Improvement District No. 1 voting at an election to authorize the bonded indebtedness.

14. Rincon has water available and is ready, able and willing to serve said land which lies within the boundaries of Improvement District No. 1.

15. The requirements of Water Code § 71699 are not provided for in the Merger Agreement.

16. The Merger Agreement was never in fact submitted for a vote to the Rincon constituents to obtain approval of the terms and conditions of that Agreement.

17. From the face of the Merger Agreement, it is apparent that the Agreement had as its long range objective the merger of the Escondido and Rincon Water Systems with the hope of improving water service and realizing some economies.

18. Upon "full operational merger" provided for in the Merger Agreement, all of the rights, duties, privileges and responsibilities of the Rincon Board of Directors would be delegated to and performed or borne by the City of Escondido.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. The right of residents of a municipal water district to vote for the members of the governing body of the district is fundamental because the acts of the governing board of a municipal water district have significant impact on the quality of water consumed, the availability of water for domestic and agricultural requirements and the economic well-being of water users within the district.

2. The contemplated merger will disenfranchise the residents and water users of Rincon, who will be subjected to water rates fixed by, and who will have questions of expansion, acquisition, maintenance and revenue determined by, a board composed of representatives they did not and could not elect to or remove from office.

3. The validity of an agreement is not determined by deciding whether it is desirable or wise. Those factors are irrelevant.

4. The Merger Agreement constitutes a total transfer from Rincon to City of all the powers and the duties of the Board of Directors of Rincon. Although the Merger Agreement provides that Rincon's responsibility would be "to protect the rights of" its residents under the terms of the Merger Agreement and to assist in the implementation of the Agreement "in any way possible," Rincon would hold only bare legal title to its water system and would exercise no powers, duties, rights or privileges; all of these would have been delegated to City.

5. The Merger Agreement violates the doctrine prohibiting delegations of legislative power as established by *Kuger v. Yocum*, (1968) 69 Cal. 2d 371 and *Bagley v. City of Manhattan Beach*, (1976) 18 Cal. 3d 22.

6. The operational merger provided for in the Merger Agreement would be a violation of Water Code § 71300, which mandates that the Board of Directors of Rincon exercise all of the District's powers, privileges and duties.

7. The Merger Agreement violates Water Code § 71301, specifying the permitted delegations of the Board's powers and duties because the delegation mandated in the Merger Agreement is to an unauthorized "office" within the terms of that provision.

8. Water Code §§ 71722 and 71723 are not applicable to the facts of this case because those sections facilitate a district's exercise of its own powers either alone or jointly, and there is no joint exercise of power, or individual separate exercise of power between Rincon and City, in the Merger Agreement.

9. The entire Merger Agreement is void in its entirety and not severable because the Merger Agreement violates Water Code § 71699 which requires that the consent of at least a majority of the voters be obtained at a special election, which was not done in this case.

10. Government Code § 6500 *et seq.* providing for the joint exercise of powers, is not applicable to the facts of this case. These provisions contemplate and authorize the joint exercise of a common power, not the relinquishment of all power by one public agency to another as under the Merger Agreement.

11. Even if the Merger Agreement were not entirely void under Water Code § 71699, it is an integrated agreement with but one purpose, *i.e.*, operational merger, and the invaild delegation of authority provided for therein is not severable from the balance of the Agreement.

Let judgment be entered accordingly.

Dated: September 27, 1978

W. BUTTERMORE

JUDGE OF THE SUPERIOR COURT
WESLEY B. BUTTERMORE, JR.

Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-718
IN THE

Supreme Court of the United States

October Term, 1980

JAMES O. HEWITT, *et al.*, and RINCON DEL DIABLO MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

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No. 80-718

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vs.

THE CITY OF ESCONDIDO,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent, the City of Escondido, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision in this case by the California Court of Appeal, Fourth Appellate District, Division 1.

Opinion Below.

The opinion of the California Court of Appeal is reported at 107 Cal.App.3d 78, 165 Cal.Rptr. 545, and a printed copy is attached to the petition as Appendix A.[1]

[1]As used herein, "Pet." refers to the Petition for a Writ of Certorari; "Opinion" refers to the decision of the Court of Appeal with page references being the pages of Appendix A to the petition; "Appendix" refers to an appendix to the petition.

Statement of the Case.

In 1972, two contiguous California public agencies—a city and a water district—entered into a contract which provided for the integration and operation of their overlapping water systems. The agreement, which ended litigation between the two agencies, was the product of extensive negotiations. Those in charge of making decisions—the elected officials of each—determined that it was in the interest of their respective water users to create a single, unified water system which would meet the needs of all the residents of the valley that the two agencies occupied, and which would eliminate the recurrent controversies that had engaged the parties over the years as the area urbanized and the city inexorably expanded into the territory of the water district.

The sole question presented to the courts below was the validity of the resulting Operational Merger Agreement, a copy of which is attached to the petition as Appendix B. In a unanimous opinion, the California Court of Appeal found that the agreement was authorized by express statutes of the State Legislature and that it complied with standards established by California law as well as the United States Constitution. The California Supreme Court declined to grant a petition to hear the matter, and the decision of the Court of Appeal is now final.

The interpretation and application of numerous state statutes, constitutional provisions and legal principles were involved in reaching the final decision below. One of the many claims asserted by petitioners is the one now being presented to this Court, namely, that the voting power and influence of the voters within the water district somehow had been "unconstitutionally diluted" by the agreement. (Pet. 7.)

Petitioners base their argument on the claim that the water district relinquished "virtually all policy-making, discretionary power" to the city. (Pet. 6.) This characterization of the agreement is incorrect and misleading, since the agreement involved only the *operations* of the two water systems of the parties, which were to be integrated and managed as a single system. It did not deal with or affect other powers and functions of the district. Petitioners description of the district as "virtually powerless to control its own destiny" (Pet. 6) was found by the Court of Appeal to be an inaccurate interpretation of the agreement. The Court of Appeal correctly determined that:

> "Full operational merger will not reduce Rincon [district] to an 'empty shell' nor result in a complete abdication of all its legislative power, as contended by [petitioner] Hewitt. Rincon will still continue to exist as a legal entity with a variety of powers and responsibilities. It still has power to acquire, construct and operate facilities for treatment and disposal of sewage, waste and storm water (Water Code, § 71660). Its board of directors shall still determine the amounts necessary to be raised by taxation during the fiscal year and shall fix tax rates to be levied (Water Code, § 72093). Although the rates for water service will in effect be set by City, the board of directors has predetermined by the merger agreement those rates will be at cost and will not exceed the rates charged any other water user in the entire Escondido Valley area. Rincon will retain its membership with the San Diego Water Authority in order to help protect the water supply to Escondido Valley and assist in any possible manner in the implementation of the merger agreement (see *ante*, § 26 [of the agreement]).
>
> "Rincon also retains the power and ability to monitor and enforce the merger agreement to make certain City

lives up to its assumed responsibilities, and if a substantial breach of contract occurs, Rincon has appropriate remedies in court." (Opinion, A-8.)

REASONS FOR DENYING THE WRIT.

I.

The Voting Power of the Voters of the District Was Unaffected.

All powers, privileges and duties of the water district are exercised and performed by a board of directors (Cal. Water Code, § 71300), the members of which are elected by the qualified voters of the district. (Cal. Water Code, §§ 71500-05.) These voting rights of the electorate of the district are untouched by the agreement. The district continues in existence, continues to own property, continues to have and exercise significant powers, and continues to have an elected board of directors to conduct its affairs. The voting rights of the people continue as before.

The only thing that has happened is that the board of directors of the district has transferred to the city, pursuant to a negotiated agreement, contractual rights to operate the district's water system in accordance with specified standards, while retaining to itself reciprocal contractual rights to monitor and enforce the agreement. Such an agreement is recognized under California law as beneficial and necessary. As the Court of Appeal declared:

> "The merger agreement is a contract of cooperation by two public agencies who have joined together to form one integrated water system, with each party contributing certain physical assets or property and agreeing to perform certain activities to integrate their respective water systems. Upon full integration or, as the agreement states, 'after full operational merger,' the combined systems will be operated exclusively by one agency for the benefit of both parties. This is exactly what was intended by Legislature when it enacted sections 71722 and 71723 [of the California Water Code]." (Opinion, A-10.)

No constitutional infirmity regarding the right to vote has been or can be raised, since voting rights remain unaffected by the agreement.

II.

The Equal Protection Clause Is Not Violated by the Operational Merger Agreement.

Recognizing that the right to vote has not been *directly* affected, petitioners argue that the "force and effect of the vote" has been "eroded and diluted" (Pet. 6) and that the voters "influence on the decision-making process" also has been diluted (Pet. 7). Petitioners cite no decisions from this or any other court for their claim that this constitutes a denial of equal protection of the laws. The most that they can point to is a passing observation, regarding a union taking over the functions of a school board, by Justice Powell in a footnote to a concurring opinion in *Abood v. Detroit Board of Education*, 431 U. S. 209, 261, n. 15, 52 L. Ed. 2d 261, 301, 97 S. Ct. 1782 (1977), a case involving the propriety of an "agency shop" arrangement for local government employees in Michigan. The comment, even if accepted by this Court, is inapposite to the present case, since the operational agreement does not involve delegation of the unlimited range of power that concerned Justice Powell. On the contrary, the agreement deals only with the water operations of the district, narrowly circumscribing the power of the city by delineating and specifying its responsibilities.

More directly in point is the 1978 decision of this Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 58 L. Ed. 2d 292, 99 S. Ct. 383 (1978), in which the constitutional propriety of a state statute vesting in a city extensive police powers over adjacent rural areas was in question. This Court held that neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment had

been violated. The case involved powers and functions far more pervasive than the mere providing of water service. We submit that Justice Stevens, in his concurring opinion in *Holt Civic Club,* accurately stated the law applicable to the present case when he declared:

> "Certainly there is nothing in the Federal Constitution to prevent a suburb from contracting with the nearby city to provide municipal services for its residents, even though those residents have no voice in the election of the city's officials or in the formulation of the city's rules." (439 U.S. at 76.)

The city and the water district have not gone as far as Justice Stevens indicated was permissible. Standards were incorporated in the Operational Merger Agreement, which required the providing of "good water service" as defined in the agreement (Pet., Appendix B, § 5(a)), mandated a uniform system of water rates for the entire area (Pet., Appendix B, § 21), and prohibited the city from using water revenues to finance any other city functions (Pet., Appendix B, § 21). Moreover, title to the district's water system continued to be vested in the district, including any future additions, betterments and extensions, subject only to the operation of the system by the city under the terms of the agreement. (Pet., Appendix B, § 25.)

The agreement was and is an innovative attempt to physically unify interwoven water systems and to foreclose future political and legal controversies, with the voters and water users being the ultimate beneficiaries. This was accomplished not by legislative fiat, but by a cooperative understanding following give-and-take by the elected representatives of each side. Such agreements have long been sanctioned and encouraged by California law (Cal. Water Code, §§ 71722-23; Cal. Government Code, § 6502; *City of Oakland v. Williams* 15 Cal.2d 542, 549, 103 P.2d 168

(1940)), as well as by other jurisdictions (56 Am. Jur.2d, *Municipal Corporations*, § 217; 123 A.L.R. 997 (1939)). It is respectfully urged that this Court should not jeopardize the existence of a myriad of joint governmental ventures throughout the nation by a decision which would create and then give constitutional status to a right not to have the "vote" or "influence" of a voter "diluted" by a contract entered into by his elected representatives affecting some functions of the elected body. As this Court said in *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 110-111, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967):

> "Viable local governments may need many innovations numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Petitioners' thesis would be a unique extension of the concept of equal protection. If it is adopted, two public agencies would be forever barred from entering into any kind of cooperative agreement with each other, since in every such instance the powers of one governing board must necessarily be reduced. In any contract, each party gives up some discretion and some independence by binding itself to the terms of the contract. This is an inherent characteristic of any contract, whether between public or private parties.

There is no question but that this Court has been properly vigilant and zealous in its concern for the voter and in guaranteeing his or her right to utilize the ballot box and be heard. But it would be straining of constitutional principles to infer a denial of equal protection of the laws from a contract which merely involves the operation of a local water system. Petitioners grossly overstate their argument in trying to equate this case with this Court's monumental

decision in *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964), which dealt with the malapportionment of state legislative bodies and the invidious and discriminatory effects of such apportionment upon the voter. Justice Holmes' observation in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 52 L. Ed. 828, 28 S. Ct. 529 (1908), which was quoted with approval in *Holt Civic Club v. City of Tuscaloosa, supra*, 439 U.S. at 70, 58 L. Ed. 2d 292, 99 S. Ct. 383, is particularly appropriate here:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

The extension of the boundaries of equal protection of the laws into the realm of governmental contracts would be disruptive of such relationships, while producing, at best, speculative benefits for the electorate of those contracting parties. This is particularly true under the facts of this case involving a single agreement affecting only the operations of a utility service without interfering in any way with either the remaining powers of the elected officials or with the right of the people to vote.

As the Court of Appeal said:

> "The merger agreement does not substitute the city council of Escondido for the board of directors of Rincon [district], as analogized by [petitioner] Hewitt. The Rincon board of directors with its remaining duties and powers is unaffected by the agreement which deals only with the maintenance and operation of the water system. Rincon's board of directors will continue to

exist and function by exercising all of its powers except the day-to-day operation of the water system." (Opinion, A-14)

Conclusion.

No meritorious issues have been raised by petitioners, who seek to extend constitutional safeguards far beyond the limits heretofore deemed necessary by this Court. There are no conflicting decisions, state or federal, that need reconciliation by this Court. We submit that the California court correctly determined that there was "no disenfranchisement of the voters of Rincon and no denial of equal protection of the law." (Opinion, A-13.) The application for a writ of certiorari, therefore, should be denied.

Dated: November 28, 1980.

Respectfully submitted,

PAUL D. ENGSTRAND,

Attorney for Respondent
City of Escondido.

Of Counsel

WALLACE R. PECK,

JENNINGS, ENGSTRAND & HENRIKSON,

A Professional Law Corporation.